UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

JOEL H. HARRISON	:	
	:	
v.	:	C.A. No. 03-75S
	:	
MBNA AMERICA BANK, N.A., et al.	:	

REPORT AND RECOMMENDATION

Lincoln D. Almond, United States Magistrate Judge

Background

Before this Court is Defendant MBNA America Bank, N.A.'s ("Defendant" or "MBNA") Motion for Summary Judgment (Document No. 60) pursuant to Fed. R. Civ. P. 56. In his Complaint, Plaintiff Joel H. Harrison ("Plaintiff") alleges four counts of violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681, et seq. ("FCRA"). Only Count IV of Plaintiff's Complaint is directed against MBNA. Count IV alleges a violation of Section 1681s-2(b) of the FCRA. MBNA, an international issuer of credit cards, is sued in its capacity as a furnisher of credit information.

Plaintiff's Complaint also contains claims under the FCRA against three consumer reporting agencies or credit bureaus – Trans Union, LLC; Experian Information Solutions, Inc.; and Equifax Information Services, LLC. However, Plaintiff's claims against Trans Union (Count I), Experian (Count II) and Equifax (Count III) have, by stipulation, been dismissed with prejudice. (Document Nos. 42, 77 and 80).

Defendant submitted its Motion for Summary Judgment and Memorandum of Law (Document No. 60) on October 22, 2004. Plaintiff objected to Defendant's Motion and submitted

his Memorandum of Law (Document No. 70) on December 1, 2004. This matter has been referred to me for preliminary review, findings and recommended disposition. 28 U.S.C. § 636(b)(1)(B); Local Rule of Court 32(c). A hearing was held on January 6, 2005. After reviewing the Memoranda submitted, listening to the arguments of counsel and conducting my own independent research, I recommend that Defendant's Motion for Summary Judgment be DENIED.

Statement of Facts

Plaintiff and his ex-wife, Sharon Harrison, were married on September 20, 1986. Defendants' Joint Appendix ("JA") at Ex. 19. At the time and for approximately ten years thereafter, Sharon Harrison was employed in Plaintiff's dental practice as a nurse/office manager. Plaintiff's Ex. B at pp. 12-13. During their marriage, Plaintiff's and Sharon Harrison's salary from the dental practice was deposited into a joint checking account maintained by the couple at Citizens Bank ("Citizens") of Providence, Rhode Island. JA at Exs. 5-7. Mrs. Harrison testified that she took care of paying the couple's bills from their joint checking account and that she generally "handled the account." JA at Ex. 4, pp. 14-15. Mrs. Harrison also testified that the couple had a "practice" of opening up credit cards jointly. Pl.'s Ex. B at p. 31.

The factual dispute in this matter centers on whether or not a certain credit card account with MBNA (hereinafter referred to as the "5952 Card") was an account opened individually by Sharon Harrison or jointly by the couple during their marriage. As will be discussed more fully below, Plaintiff denies any joint responsibility for the 5952 Card and asserts that, at most, he was an authorized user who does not have joint and several liability on the card. Although MBNA is unable to produce a signed application or signature card for the 5952 Card or any charge slips against that

card signed by Plaintiff, it argues that the totality of the evidence it presents establishes that there is no genuine issue of material fact regarding Plaintiff's joint liability on the 5952 Card. Plaintiff, on the other hand, contends that MBNA's evidence is primarily circumstantial and that he has produced sufficient evidence, in large part through his sworn affidavit, to present a genuine issue of material fact precluding the entry of summary judgment under Rule 56, Fed. R. Civ. P. This Court is precluded under Rule 56 from resolving credibility disputes and must draw all reasonable inferences regarding the evidence presented in the favor of Plaintiff.

Plaintiff does not dispute that the Citizens joint checking account with Sharon Harrison included overdraft protection. Plaintiff also does not dispute that overdraft charges arising from the joint checking account were charged to a credit card (hereinafter referred to as the "4890 Card") reported on the same statement as the Citizens joint checking account. JA at Exs. 7, 8 and 10. Finally, Plaintiff does not dispute that the 4890 Card was sold by Citizens to MBNA and later became the 5952 Card.

In January of 2000, Sharon Harrison filed for divorce from Plaintiff. Plaintiff's divorce attorney, Alan Dworkin, produced handwritten notes taken during a meeting with Plaintiff on February 11, 2000 which indicates that "all accounts are joint. W [Sharon Harrison] pays marital debts + bills." JA at Ex. 12. Plaintiff does not dispute the authenticity of these notes but rather Plaintiff denies, in his Affidavit, that he ever told his divorce lawyer – or anyone else for that matter – that all accounts (including the 5952 Card) were joint with Sharon Harrison. Pl.'s Ex. A at ¶ 6. On August 10, 2000, a cash transfer in the amount of $5,000.00 was deposited into Plaintiff's Fleet checking account from the 5952 Card. JA at Ex. 16. Again, Plaintiff does not dispute the existence

of this cash transfer. Rather, he denies in his Affidavit that he used the 5952 Card to transfer the money. Pl.'s Ex. A at ¶ 7.[1] Plaintiff indicates in his statement of disputed material facts that Sharon Harrison made the transfer from the 5952 Card to his Fleet checking account. The only evidentiary support Plaintiff provides for this conclusion is a statement by Sharon Harrison at her deposition that she "thought" she used the 5952 Card generally to transfer money into the couple's joint checking account. Pl.'s Ex. B at p. 19. MBNA has failed to produce any documentary evidence that Plaintiff was in fact the individual who authorized and made the $5,000.00 cash transfer into his checking account.

Plaintiff and Sharon Harrison entered into a Marital Settlement Agreement on December 18, 2000 which resolved a number of property and other economic issues between the parties as of October 17, 2000. JA at Ex. 19. Pursuant to the parties' agreement, Plaintiff forwarded a check in the amount of approximately $17,000.00 to MBNA as payment on the 5952 Card. In a handwritten letter accompanying the check, Plaintiff notes that he is "not responsible" for this account and also that "[s]ince my divorce from Sharon L. Harrison, she will continue to be responsible for this account solely." JA at Ex. 20. In his Affidavit, Plaintiff asserts that this payment was made from Sharon Harrison's "alimony proceeds" and does not constitute any admission of his responsibility on the 5952 Card. Pl.'s Ex. A at ¶ 11 and 12.

[1] See Bruce v. First U.S.A. Bank, 103 F. Supp. 2d 1135, 1144-45 (E.D. Mo. 2000) (plaintiff's denial in his affidavit of responsibility for transfer of outstanding balance from one of his credit card accounts to the disputed credit card account created a triable issue of fact and did not estop plaintiff from denying responsibility for the disputed account).

In April of 2001, Plaintiff sent a typed letter to Trans Union in regard to the 5952 Card. See JA at Ex. 22. In that letter, Plaintiff advises that the account "belongs" to his ex-wife Sharon Harrison and notes that "[i]t was joint until October 2000." Id. In addition, on April 2, 2001, Plaintiff sent a letter directly to MBNA regarding payment history on the 5952 Card and repeatedly used the pronoun "we" in regard to the account and payment history on this and other MBNA accounts. JA at Ex. 36. Plaintiff does not directly address his comment in the letter to Trans Union that the 5952 Card was joint at least until October of 2000 – the effective date of his Marital Settlement Agreement with Sharon Harrison. As to the April 2, 2001 letter to MBNA, Plaintiff asserts that he wrote the letter at Sharon Harrison's request and also because he was concerned that the 5952 Card was hurting his credit history. He asserts in his Affidavit that this letter was never meant to be an admission of responsibility. Pl.'s Ex. A at ¶ 15.

MBNA argues that additional evidence establishes Plaintiff's liability on the 5952 Card. First, Plaintiff made certain payments on the account between December of 2001 and October of 2002 – well after his divorce from Sharon Harrison. Although Plaintiff does not deny making these payments, Plaintiff asserts in his Affidavit that all such payments were made from "the alimony money I was responsible to pay to Sharon Harrison and were made to avoid further damage to my credit." Pl.'s Ex. A at ¶ 20. Second, Sharon Harrison filed for bankruptcy in September of 2002 and, under penalty of perjury, she disclosed Plaintiff as a co-debtor on the 5952 Card. JA at Ex. 25. After the fact, Sharon Harrison testified that Plaintiff was listed as a co-debtor only because he was included on the billing statement for the 5952 Card and that she did not believe that the account was joint but that was how MBNA was treating it. Pl.'s Ex. B at pp.10-12. While Plaintiff cannot be

bound by the disclosures of his ex-wife in her own bankruptcy proceeding, MBNA notes that Plaintiff hired his own attorney to represent his interests in Sharon Harrison's bankruptcy. Plaintiff's bankruptcy attorney sent a letter to Sharon Harrison's attorney on December 5, 2002 which referenced the 5952 Card which was issued "apparently in their joint names, but used exclusively by [Sharon Harrison]." JA at Ex. 26. (emphasis added). Although Plaintiff does not dispute that the bankruptcy attorney communicated with Sharon Harrison's attorney, there is no evidence in the record that the information regarding the 5952 Card was provided to the attorney by Plaintiff or otherwise adopted by him.

Plaintiff's Affidavit executed on December 1, 2004 emphatically denies that the 5952 Card was ever opened as a joint account. However, Plaintiff was less emphatic in his deposition one year earlier on November 14, 2003. In that deposition, Plaintiff stated that the 5952 Card could have been joint but he did not know. JA at Ex. 9, p. 50. When asked at the deposition why he did not believe MBNA's representation that 5952 Card was joint, Plaintiff testified as follows:

> A. Again, it's a very simple thing. They can't give me any documentation that I have ever signed to open the account. Many years ago, and I don't know if this applies to Federal Court or anything like that, when I first started in practice I had two cases thrown out of Small Claims Court because we couldn't provide documentation to a small claims judge, these were injury cases that had gone on five, six years with attorneys, and in the end, I lost those cases because I couldn't provide documentation that the patient had signed accepting responsibility.

Id. at pp. 50-51.

The fact that Plaintiff may have been prejudiced by the lack of documentation in a prior Small Claims Court matter does not give him license in this matter to try to teach the same lesson to MBNA, and this Court sincerely hopes that is not Plaintiff's intention. Reviewing all of the evidence in the light most favorable to Plaintiff as required by Fed. R. Civ. P. 56, this Court finds that Plaintiff has met his burden (although barely so) of establishing the existence of a genuine issue of material fact for trial regarding Plaintiff's responsibility for the 5952 Card. Plaintiff is advised, however, that this Court found this issue to present a very close call and is troubled by the possible inconsistencies in some respects among Plaintiff's affidavit, deposition testimony, other written notes/letters and objective financial evidence. The scale was ultimately tilted in Plaintiff's favor because of the failure of MBNA (a sophisticated credit furnisher) to produce a signed application, signature card, cardholder agreement, charge slip or any other documentation establishing Plaintiff's joint liability on the 5952 Card.

Summary Judgment Standard

A party shall be entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). When deciding a motion for summary judgment, the Court must review the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in the nonmoving party's favor. Cadle Co. v. Hayes, 116 F.3d 957, 959 (1st Cir. 1997).

Summary judgment involves shifting burdens between the moving and the nonmoving parties. Initially, the burden requires the moving party to aver "an absence of evidence to support

the nonmoving party's case." Garside v. Osco Drug, Inc., 895 F.2d 46, 48 (1st Cir. 1990) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986)). Once the moving party meets this burden, the burden falls upon the nonmoving party, who must oppose the motion by presenting facts that show a genuine "trialworthy issue remains." Cadle, 116 F.3d at 960 (citing Nat'l Amusements, Inc. v. Town of Dedham, 43 F.3d 731, 735 (1st Cir. 1995); Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d 576, 581 (1st Cir. 1994)). An issue of fact is "genuine" if it "may reasonably be resolved in favor of either party." Id. (citing Maldonado-Denis, 23 F.3d at 581).

To oppose the motion successfully, the nonmoving party must present affirmative evidence to rebut the motion. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57, 106 S. Ct. 2505, 2514-2515, 91 L. Ed. 2d 202, (1986). "Even in cases where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, [or] unsupported speculation." Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990). Moreover, the "evidence illustrating the factual controversy cannot be conjectural or problematic; it must have substance in the sense that it limns differing versions of the truth which a factfinder must resolve." Id. (quoting Mack v. Great Atl. & Pac. Tea Co., 871 F.2d 179, 181 (1st Cir. 1989)). Therefore, to defeat a properly supported motion for summary judgment, the nonmoving party must establish a trialworthy issue by presenting "enough competent evidence to enable a finding favorable to the nonmoving party." Goldman v. First Nat'l Bank of Boston, 985 F.2d 1113, 1116 (1st Cir. 1993) (citing Anderson v. Liberty Lobby, 477 U.S. at 249).

Analysis

A. Statutory Backdrop

Congress enacted the FCRA in 1970 as Title VI of the Consumer Credit Protection Act, 15 U.S.C. §§ 1601-1693r ("CCPA"), which regulates the consumer credit industry. Consumer credit has expanded greatly and is now one of the largest sectors of the national economy. To support this level of activity, the consumer reporting industry in 1993 maintained 450 million credit files on more than 110 million individuals and processed almost two billion pieces of data per month. S. Rep. 103-209, at 2-3 (1993). More recently, statistics from just one of the three major consumer reporting agencies, Trans Union, showed that its database at that time contained information on 190 million adults and it received between 1.4 and 1.6 billion records per month. Trans Union Corp. v. FTC, 245 F.3d 809, 812 (D.C. Cir. 2001). In view of the potential for errors inherent in such a massive information system, Congress adopted the FCRA with the explicit recognition that the health of the consumer banking system is "dependent upon fair and accurate credit reporting" and that "[i]naccurate credit reports directly impair the efficiency of the banking system." 15 U.S.C. § 1681(a)(1).

A recurring theme of the CCPA is that the dissemination of accurate credit information is essential to maintain the vitality of the credit granting system for the benefit of creditors and consumers alike. Just as Congress enacted the FCRA with the express purpose that credit grantors be in the best position to make reliable credit granting decisions, the Truth in Lending Act, 15 U.S.C. §§ 1601-1667e, Title I of the CCPA ("TILA"), establishes the corresponding principle through its disclosure requirements that consumers are best served through their own "informed use of credit."

15 U.S.C. § 1601(a). In addition to the FCRA and TILA, Congress has included a further regulatory mechanism within the CCPA known as the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f ("ECOA"), providing an additional information-sharing standard through its requirement that creditors disclose, and consumers receive, the specific reasons for any adverse action taken by a creditor, such as credit denial. 15 U.S.C. § 1691(d).

Because of concerns that accurate information may not be consistently provided by the consumer reporting system to credit providers, Congress strengthened the CCPA with the 1996 FCRA Amendments. In the debate that preceded the 1996 Amendments, Congress was informed by a Consumer's Union survey that nearly half of all consumer reports (48%) maintained by the three major consumer reporting agencies contained inaccurate information. S. Rep. 103-209, supra, at 3. Due to the drastic growth in the industry, Congress saw a need to strengthen the credit reporting system that it had left essentially untouched since the CCPA was originally enacted in 1970. Id. at 2.

Before the 1996 FCRA Amendments, furnishers of information to consumer reporting agencies were outside the scope of the FCRA. Nelson v. Chase Manhattan Mortgage Corp., 282 F.3d 1057, 1060 (9th Cir. 2002). Despite the central role that these entities played as the primary source of the data which the consumer reporting agencies collected and disseminated, furnishers were not directly regulated by the FCRA. Furnishers were under no federal duty to report accurate information to consumer reporting agencies, to respond to or investigate a consumer's dispute, or to assist the consumer reporting agencies in their duty to investigate the completeness or accuracy of the information which the furnisher itself provided. Vazquez-Garcia v. Trans Union De Puerto

Rico, 222 F. Supp. 2d 150, 154 (D.P.R. 2002). This omission was significant since the consumer reporting agencies themselves were bound to follow reasonable procedures to assure the accuracy of their reports and to investigate a consumer's dispute that the information was incomplete or inaccurate. 15 U.S.C. § 1681i. Consistent with the absence of furnisher obligations, the FCRA permitted consumers to file civil actions only against a "consumer reporting agency or user of information" which violated the Act. See Nelson, 282 F.3d at 1060.

In 1996 Congress amended the FCRA through the Consumer Credit Reporting Reform Act of 1996, Title II, Subtitle D, Ch. 1, of the Omnibus Consolidated Appropriations Act for Fiscal Year 1997 (P.L. 104-208) (Sept. 30, 1996). Among the changes made to the FCRA are two which are relevant here. First, Congress enacted an entirely new section, codified in § 1681s-2, imposing specific responsibilities on furnishers of information, such as MBNA. Second, Congress expanded the consumer dispute resolution process of Section 1681i, including enacting Section 1681i(a)(2), which requires a consumer reporting agency to promptly notify the furnisher of disputed information and triggers the furnisher's corresponding duties under Section 1681s-2(b).

The Senate Report accompanying the legislation confirms the limited FCRA coverage before 1996 and the intended impact of the amendments on furnishers:

> Currently, the FCRA contains no requirements applying to those entities which furnish information to consumer reporting agencies. Section 413 imposes certain obligations upon those furnishers of information to consumer reporting agencies. The Committee believes that bringing furnishers of information under the provisions of the FCRA is an essential step in ensuring the accuracy of consumer report information.

S. Rep. 104-185, at 49 (1995).

The FCRA imposes responsibilities on three categories of persons: "users," "consumer reporting agencies," and "furnishers." "Users" are permitted to access and "use" a consumer's credit report under certain specified circumstances. See 15 U.S.C. § 1681e. "Consumer reporting agencies" are subject to most of the requirements within the FCRA. The statute details to whom and how a credit report may be delivered, 15 U.S.C. § 1681b, the disclosures required from the credit reporting agencies, 15 U.S.C. § 1681g, and how these may be made. 15 U.S.C. § 1681h. Finally, the FCRA establishes a detailed procedure by which consumers may dispute inaccurate information within their credit files. 15 U.S.C. § 1681i.

The category of person applicable in this case is the "furnisher." The furnisher is the person who actually reports information to a credit reporting agency. Usually the furnisher is a creditor such as MBNA. The responsibilities of furnishers are now detailed at 15 U.S.C. § 1681s-2 which was enacted as part of the 1996 FCRA Amendments. The first subsection of Section 1681s-2 lists a wide range of furnisher responsibilities which govern how a creditor is to maintain and report information on a consumer. 15 U.S.C. § 1681s-2(a). These obligations include a duty to maintain accurate information and to correct and update inaccurate information. As part of the 1996 Amendments, Congress also enacted 15 U.S.C. §§ 1681s-2(c) and (d). These subsections expressly exclude subsection (a) violations from the FCRA remedy sections, 15 U.S.C. §§ 1681n and 1681o. Thus, there is no private cause of action for a furnisher's violation of 15 U.S.C. § 1681s-2(a). See Nelson, 282 F.3d at 1060. Only the Federal Trade Commission and the state government may enforce subsection (a) violations.

However, the same is not true for 15 U.S.C. § 1681s-2(b). Subsection (b) imposes certain duties upon the furnisher only upon its receipt of a notice of dispute from a consumer reporting agency. Essentially, subsection (b) protects the creditor against private remedies if it properly investigates and responds to the consumer's dispute through the consumer reporting agency. The overwhelming majority of courts considering the issue have held that Section 1681s-2(b) provides a private cause of action for consumers against furnishers of information. See, e.g., Vazquez-Garcia, 222 F. Supp. 2d at 155; Gibbs v. SLM Corp., 336 F. Supp. 2d 1, 11 (D. Mass. 2004). Although MBNA challenges in its Second Affirmative Defense Plaintiff's standing to maintain a cause of action under Section 1681s-2(b), it has not raised this issue in its Motion for Summary Judgment. Therefore, this Court will follow the weight of authority and proceed on the basis that Plaintiff has a private right of action to enforce Section 1681s-2(b).

B. MBNA's Defense of Accuracy

MBNA's primary argument in support of its Motion for Summary Judgment is that it is not liable to Plaintiff under the FCRA because the information it furnished to credit reporting agencies regarding the 5952 Card was accurate. At oral argument, counsel for MBNA stated, "[o]ur argument for summary judgment is really based on one thing and that is this information is accurate." In support of its argument, however, MBNA directs the Court only to cases construing the duties of credit reporting agencies under Section 1681e(b) of the FCRA. MBNA does not cite to cases recognizing an accuracy defense in situations construing the duties of furnishers of information under Section 1681s-2(b). MBNA claims "[t]he defense of accuracy which applies to claims against credit reporting agencies applies with equal vigor to claims against credit furnishers." MBNA's Reply

Mem. p. 4. MBNA suggests that the policy reasons underlying the FCRA mandate the conclusion that the accuracy defense is as viable for a furnisher of information as it is for a credit reporting agency.

While it is true that an important aim of the FCRA is the furnishing and reporting of accurate information, and true that furnishers have a duty to report accurate information, MBNA's argument that an accuracy defense applies to furnishers just as it does to credit reporting agencies is incorrect. First, MBNA's argument contradicts the plain language of the statute itself and cases interpreting it. Furnishers have a duty to provide accurate information, but they also have additional duties, as outlined in the statute. Vazquez-Garcia, 222 F. Supp. 2d at 154 ("[Section] 1681s-2(a), requires furnishers of information to provide accurate information to consumer reporting agencies; § 1681s-2(b), on the other hand, imposes a duty to conduct investigation and promptly report any inaccurate or incomplete information to consumer reporting agencies, upon notice of a dispute by a consumer."); see also Gordon v. Greenpoint Credit 266 F. Supp. 2d 1007, 1011 (S.D. Iowa 2003) ("Simply stating that furnishers of information have a duty to provide accurate information, however, cannot prevent the occurrence of error. Accordingly, the FCRA imparts a second duty on furnishers of information, the duty to investigate disputed information once notified of the dispute by the credit reporting agency.") Plaintiff's claim in this case must be construed solely under Section 1681s-2(b) because Plaintiff is not pursuing, and in fact cannot pursue, a claimed violation of Section 1681s-2(a).

This case is also not governed by Section 1681e(b) which solely deals with the issue of accuracy. See, e.g., Cahlin v. GMAC, 936 F.2d 1151 (11th Cir. 1991). Section 1681e(b), 15 U.S.C.,

requires consumer reporting agencies to "follow reasonable procedures to assume maximum possible accuracy of the information concerning the individual about whom the report relates." In order to prevail on a claim under Section 1681e(b), a plaintiff must establish that (1) inaccurate information was contained in his or her credit report; (2) the inaccuracy was the result of defendant's failure to follow reasonable procedures; (3) he or she suffered injury; and (4) the injury was caused by the inaccuracy. Philbin v. Trans Union Corp., 101 F.3d 957, 963 (3rd Cir. 1996). Because of the nature of these elements, courts have concluded that Section 1681e(b) was intended to "penalize[ ] dissemination of inaccurate reports." Evantash v. G.E. Capital Mortgage Services, Inc., No. 02-1188, 2003 WL 22844198, at *3 (E.D. Pa. Nov. 25, 2003). Thus, courts have created a so-called "accuracy defense" and held that a credit reporting agency is entitled to summary judgment "if a court finds, as a matter of law, that a credit report was 'accurate.'" Cahlin, 936 F.2d at 1156.

While MBNA's argument has some facial attractiveness due to the FCRA's theme of accuracy, MBNA is trying to fit a square peg into a round hole. The language, structure and purpose of Section 1681e(b) is distinct from that of Section 1681s-2(b). Rather than dealing with procedures to maximize accuracy at the front end, Section 1681s-2(b) creates a "filtering mechanism" for accuracy disputes and sets forth a procedure intended to give "an opportunity to the furnisher to save itself from liability by taking the steps required by Section 1681s-2(b)." Nelson, 282 F.3d at 1060. Reading an accuracy defense into the statute contradicts this intent. This intent is further evidenced by Congress' decision to deny a private right of enforcement as to Section 1681s-2(a) – the more logical analog to Section 1681e(b).

Secondly, even if accuracy does operate as a complete defense for a furnisher of information under the FCRA, there is a "trialworthy issue of fact, which a jury must resolve" regarding the ownership of the MBNA account as noted above. See, e.g., Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990). Accordingly, this Court concludes as a matter of law that accuracy is not a complete defense to a claim under Section 1681s-2(b), and, in any event, it would not operate as a defense in this case in the context of summary judgment due to the existence of a genuine factual dispute regarding the ownership of the 5952 Card.

C. Requirements of Sections 1681s-2(b)

MBNA next argues that "[s]ection 1681s-2(b) should be read conjunctively and for Plaintiff to succeed in a claim against MBNA, Plaintiff must prove that MBNA did not comply with subsections (A) through (D)." MBNA's Mem. of Law p. 7. (emphasis added). Defendant contends that before liability can be imposed on a furnisher, that furnisher must fail to perform all four of its listed duties. The language of the statute itself does not support a reading that would require a furnisher to violate each of the four listed duties before any liability could be imposed. If Congress had intended to require that a furnisher violate all four sections as a condition of liability, it would have said so explicitly. Mallard v. United States Dist. Ct., 490 U.S. 296, 300 (1989) ("[i]nterpretation of a statute must begin with the statute's language"); Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992). See Consumer Prod. Safety Comm. v. GTE Sylvania, Inc., 447 U.S. 102, 108, (1980). ("[i]f the language of the statute is clear, we need look no further than that language in determining the statute's meaning.") Because the language drafted by Congress does

not explicitly require a furnisher to violate all four subsections, this Court will not read that requirement into the statute.

Further, the remedy sections of the FCRA which apply to furnishers of information, 15 U.S.C. § 1681n and 1681o, provide a right of action for "failure to comply with any requirement imposed under this subchapter with respect to any consumer." (emphasis added). As a matter of statutory interpretation, the statute must be given its plain meaning. After receiving notice of an accuracy dispute from a consumer reporting agency, a furnisher must, pursuant to Section 1681s-2(b), take four steps. They are: (1) conduct an investigation; (2) review relevant information produced by the agency; (3) report the results of the investigation to the agency; "and" (4) if the investigation reveals inaccuracy or incomplete information, report the results to other agencies to which the furnisher has provided such information and that nationally compile and maintain consumer files. See 15 U.S.C. § 1681s-2(b)(1)(A-D). (emphasis added). Significantly, the statute uses the conjunction "and" rather than "or" after it commands the steps the furnisher "shall" take. Further, MBNA's overall argument is undercut by the fact that compliance with the fourth element is triggered only upon the initial investigation revealing inaccurate or incomplete information. However, steps one through three are required regardless of actual accuracy and only step four is conditioned on a finding of inaccuracy or incompleteness.

MBNA's proposed interpretation is completely without merit. The statute does not require Plaintiff to prove noncompliance with all four elements to prove a violation. Rather, it requires the furnisher to comply with all four elements, when applicable, and a violation may be established when the furnisher fails to do so even as to a single applicable element.

D. Sufficiency of Plaintiff's Complaint

Count IV of Plaintiff's Complaint alleges that "MBNA violated the Fair Credit Reporting Act...by providing false information to the credit bureaus when they contacted MBNA..." Comp. ¶ 48. Plaintiff then cites the applicable statutory language in full. MBNA argues that even if accuracy is not an absolute legal defense under Section 1681s-2(b), Plaintiff has made it a defense in this case based on his description of MBNA's alleged FCRA violation in his Complaint. Based on Plaintiff's objection to MBNA's Motion for Summary Judgment, it appears his legal theory has shifted from the filing of the initial pleading in this case. Plaintiff's objection argues that MBNA "never conducts a substantive or meaningful 'investigation' as required by the FCRA." Pl.'s Mem. at p. 1. The theory has shifted from an accuracy challenge to a procedural challenge. Also, the shift in theory appears coincidental to the pro hac vice appearance of Attorney Bennett as co-counsel for Plaintiff and consistent with the theory he used successfully against MBNA in Johnson v. MBNA, 357 F.3d 426 (4th Cir. 2004).

Even though Plaintiff's Complaint alleges merely that false information was provided, it does cite and incorporate the full text of the applicable statute. Although not completely clear, the Complaint does meet the notice pleading requirements of Rule 8. "Plaintiffs only are obliged to set forth in their complaint 'factual allegations either direct or inferential, regarding each material element necessary to sustain recovery under some actionable legal theory.'" Raytheon Co. v. Continental Cas. Co., 23 F. Supp. 2d 22, 27 (D. Mass. 2000) citing Gooley v. Mobil Oil Corp., 851 F.2d 513, 515 (1st Cir. 1988). MBNA has had sufficient notice of Plaintiff's theory and has addressed the theory in its summary judgment pleadings. Thus, MBNA cannot argue that it has been

unfairly surprised by Plaintiff's legal argument to its detriment. Accordingly, this Court will not strictly and narrowly construe Plaintiff's Complaint and impose an accuracy defense to liability based solely on the pleadings.

F. Damages

Finally, MBNA argues that it is entitled to summary judgment as to some or all of Plaintiff's claimed damages. MBNA also argues that Plaintiff's claim for punitive damages fails because there is no evidence of willful noncompliance. 15 U.S.C. § 1681n(a) (civil liability for willful noncompliance).

Plaintiff correctly points out that MBNA's argument is more in the nature of multiple motions in limine to exclude damages evidence than a motion for summary judgment as to "all or any part" of a "claim" by a "defending party." Fed. R. Civ. P. 56(b). Because there are genuine issues of material fact precluding summary judgment for MBNA on the issue of liability, MBNA is essentially asking this Court to exercise its discretion under Fed. R. Civ. P. 56(d) to narrow the range of potential damages. See Antenor v. D&S Farms, 39 F. Supp. 2d 1372, 1375 (S.D. Fla. 1999) (court "may not enter summary judgment on a portion of a claim – such as the issue of liquidated damages (a potential remedy for one of Plaintiffs' causes of action)" but may make discretionary findings of fact under Rule 56(d)). MBNA concedes that its damages arguments would not be case dispositive because, in any event, if Plaintiff prevails on liability, he would at a minimum have viable claims for emotional distress damages, and reasonable attorneys' fees and costs. See 15 U.S.C. § 1681o(a) (civil liability for negligent noncompliance); Richardson v. Fleet Bank, 190 F. Supp. 2d 81, 87 (D. Mass. 2001) ("courts have consistently held that actual damages [under FCRA] may include

humiliation and mental distress even in the absence of out-of-pocket expenses") (citations omitted). At the hearing, MBNA's counsel recognized that these damages issues were "for another day."

Plaintiff also argues that MBNA improperly attempts to incorporate Experian's damages arguments from its withdrawn Motion for Summary Judgment (Document No. 61). Although Experian's Motion was withdrawn as part of a settlement, this Court indicated at the hearing that it would allow MBNA to incorporate Experian's arguments by reference. Plaintiff, however, again correctly points out that his claims against Experian were brought under Section 1681i(a) (reinvestigations of disputed information by credit bureau) and not under Section 1681s-2(b) (duties of furnisher upon notice of dispute) as is the claim against MBNA. Plaintiff argues that the legal and factual arguments made by Experian do not universally apply to his claims against MBNA due to the different treatment under the FCRA of a credit reporting agency from a furnisher of credit. For instance, Experian argued in its Motion that Plaintiff had not produced any evidence that he was denied an auto loan by Citizens based on a credit report issued by Experian rather than a Trans Union or Equifax report. This defense is obviously irrelevant to Plaintiff's claim against MBNA. While this Court decided not to preclude MBNA from adopting arguments made by its former co-defendant, it is unwilling to sort through Experian's brief to ferret out for MBNA the applicable from the inapplicable defenses.

At this stage of the litigation, this Court presumes that Plaintiff has not necessarily determined what evidence of damages he would present at trial. In fact, Plaintiff candidly admitted at the hearing that at least one of his claims for damages was weak and it is possible that Plaintiff may ultimately decide not to pursue that and potentially other damages claims at trial. This Court

has concluded that there is a triable issue regarding MBNA's liability under the FCRA in this case and MBNA concedes that if Plaintiff establishes liability at trial, he would have at least some viable damages claims. Thus, this Court believes that it would be an advisory and potentially academic exercise to sort through the legal and factual grounds for all of Plaintiff's potential damages claims prior to Plaintiff establishing liability against MBNA and actually pursuing a claim for these damages at trial. See Kendall McGaw Labs., Inc. v. Community Memorial Hosp., 125 F.R.D. 420, 422-23 (D. N.J. 1989) (court declined for reasons of judicial efficiency to entertain motion for partial summary judgment on issue of damages in view of unresolved liability issue).

As to Plaintiff's claim for punitive damages, MBNA argues that it is entitled to summary judgment because Plaintiff has not set forth any evidence to support a finding of willful conduct. "Any person who willfully fails to comply with any requirement imposed under [the FCRA] with respect to any consumer is liable to that consumer" including "such amount of punitive damages as the court may allow." 15 U.S.C. § 1681n(a). To show willful noncompliance, a plaintiff must establish that the defendant "knowingly and intentionally committed an act in conscious disregard for the rights of others." Philbin, 101 F.3d 957 at 970 (citations omitted). A showing of malice or evil motive is not required. Cushman v. Trans Union Corp., 115 F.3d 220, 226 (3rd Cir. 1997).

For the reasons discussed above, this Court has declined to parse through Plaintiff's potential damages theories in view of the overall posture of this litigation. In addition, this Court concludes that there are genuine disputes of fact regarding Plaintiff's claim that MBNA willfully violated its obligations under Section 1681s-2(b). At this point, the Court cannot weigh the evidence or question its veracity, but only determines whether there is any evidence upon which a rational trier of fact

could find for plaintiff. Applying these principles, this Court cannot say as a matter of law that no reasonable jury could find that MBNA willfully failed to investigate Plaintiff's dispute under Section 1681s-2(b).

For instance, MBNA argues that Plaintiff's claim for punitive damages fails, in part, because MBNA promptly responded to Plaintiff's request that it look for the original application for the 5952 Card and told him it was not available. MBNA's Mem. at p. 11. However, Plaintiff argues that, at least in one instance, Experian sent an ACDV (automated consumer dispute verification) to MBNA requesting confirmation of Plaintiff's claim that MBNA told Plaintiff that it could not locate a signature card for the 5952 Card. JA at Ex. 21, ¶ 20. Despite the fact that MBNA had already determined it could not locate a signature card or agreement for the 5952 Card, it responded to Experian's ACDV by stating "verified as reported" based solely on matching Plaintiff's name and social security number. Pl.'s Ex. J at pp. 34-36. MBNA's representative who responded to the ACDV could not check documents and failed to advise Experian that she did not have a copy of Plaintiff's signature and/or could not determine if MBNA had a copy. Id. at pp. 36-37. A reasonable jury could conclude that the application of MBNA's procedures and its response to Experian under the circumstances was done in conscious disregard of Plaintiff's rights and thus was willful.

Conclusion

For the reasons stated, I recommend that Defendant's Motion for Summary Judgment (Document No. 60) be DENIED. Any objection to this Report and Recommendation must be specific and must be filed with the Clerk of the Court within ten (10) days of its receipt. Fed. R. Civ. P. 72(b); Local Rule 32. Failure to file specific objections in a timely manner constitutes a waiver

of the right to review by the District Court and the right to appeal the District Court's decision. United States v. Valencia-Copete, 792 F.2d 4 (1st Cir. 1990).

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LINCOLN D. ALMOND
United States Magistrate Judge
March 21, 2005